

IN THE SUPREME COURT OF TENNESSEE

SPECIAL WORKERS' COMPENSATION APPEALS PANEL

AT NASHVILLE

(June 9, 1997 Session)

FILED
November 14, 1997
Cecil W. Crowson
Appellate Court Clerk

CHRISTOPHER STEVEN BAKER,)
)
Plaintiff/Appellant,)
)
VS.)
)
MIDDLE TENNESSEE ACOUSTICS,)
INC. and CNA INSURANCE)
COMPANY,)
)
Defendants/Appellees.)

DAVIDSON COUNTY CHANCERY
NO. 95-3178-II
Hon. Ellen Hobbs Lyle,
Chancellor
S.Ct. No. 01S01-9702-CH-00035

For the Appellant:

Steven C. Norris
Nashville, Tennessee

For the Appellees:

J. Michael Morgan
Ortale, Kelley, Herbert &
Crawford, LLP
Nashville, Tennessee

MEMORANDUM OPINION

Members of Panel:

Adolpho A. Birch, Chief Justice, Supreme Court
Robert S. Brandt, Senior Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED

Brandt, Senior Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

The plaintiff/appellant, Christopher Steven Baker, appeals from the trial court's decision holding that he failed to prove that he sustained an injury while working for the defendant/appellee, Middle Tennessee Acoustic, Inc. The outcome of the case hinges primarily on a determination of the plaintiff's credibility.

While our review is *de novo*, it is accompanied by a presumption of the correctness of the trial court's findings. Moreover, when the trial court has made a decision that hinges upon the credibility of the witnesses, it will not be disturbed on appeal unless there is in the record clear, concrete, and convincing evidence to the contrary. And, too, considerable difference is to be accorded the trial court where issues of credibility and weight of oral testimony are involved. *Townsend v. State*, 826 S.W.2d 434, 437 (Tenn. 1992), *Airline Construction, Inc. v. Barr*, 807 S.W.2d 247, 264 (Tenn. App. 1990).

The record is filled with contradictory and conflicting evidence regarding whether the plaintiff injured himself as he claims. The plaintiff, at trial, testified that he injured himself on Friday, June 2, 1995. Yet he alleges in his complaint that the injury was on June 5, a Monday. Records from Nashville's General Hospital reflect that he once gave June 3 as the date of his injury and later gave June 5 as the date. The plaintiff told Dr. David Gaw it was June 5.

Confusion over the exact date of an injury is not unusual and failure for a worker to recall the exact date or recalling an incorrect date is usually immaterial to the outcome of the case. But the plaintiff himself emphasizes the exact date. It is important for him to prove it happened on a Friday.

Wallace Harris, owner of the employer corporation, testified that the plaintiff told him he, the plaintiff, hurt himself while moving. This, of course, directly contradicts the plaintiff's testimony. But it also sheds some light on why the June 2 date surfaced at trial. By proving that he hurt himself on a Friday, the plaintiff proves that he did not hurt himself over the weekend when he moved.

Ronnie Stroud was working with the plaintiff when the plaintiff says he injured himself. The plaintiff testified he told Stroud he hurt his back and that the two of them finished the work day with Stroud doing the overhead work with the plaintiff handing Stroud the materials. Stroud testified at trial that the plaintiff never complained about being hurt and that he, Stroud, never observed the plaintiff being hurt.

The plaintiff had a previous work-related back injury. He denies that it was bothering him before June 2 or June 5, 1995. Yet he was scheduled for a Social Security disability examination with Dr. Gaw before June 2 or June 5. If he had no manifestation of disability

before June 2 or June 5, there would have been no reason to have a disability examination by an orthopedic surgeon.

The plaintiff's trial testimony regarding his condition is confusing at best. At one point he described back pain and spasms. Then he testified that his back was fine. Then he testified he had weakness and spasms and "a little pinched nerve every now and again."

All of these contradictions and discrepancies add up. While it is possible that the plaintiff hurt himself at work on June 2, 1995, it is equally possible that he did not. The trial court was justified in resolving the key credibility dispute against the plaintiff.

The trial court's decision is affirmed at the plaintiff's costs.

Robert S. Brandt, Senior Judge

CONCUR:

Adolpho A. Birch, Jr., Chief Justice

Joe C. Loser, Jr., Special Judge

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MIDDLE TENNESSEE ACOUSTICS,	(Chancellor
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	(S. Ct. No. 01S01-9702-CH-00035
Defendants-Appellees.	(AFFIRMED.

JUDGMENT ORDER

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the plaintiff and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 14th day of November, 1997.

PER CURIAM

Birch, J. - Not participating.